

February 28, 2012

231915

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

ENTERED
Office of Proceedings

FEB 29 2012

Part of
Public Record

Dear Ms. Brown:

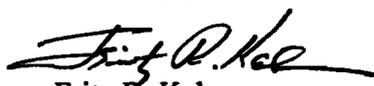
This refers to Docket No. NOR 42133, *Sierra Railroad Company and Sierra Northern Railway v. Sacramento Valley Railroad, LLC, McClellan Business Park, LLC and County of Sacramento*, and to the Respondents' Reply-to-a-Reply, filed February 27, 2012.

Attached for filing are the Complainants' petition, under 49 C.F.R. §1117.1, and tendered surreply.

I certify that I this day have served this letter and its attachment upon counsel for the Respondents, Sacramento Valley Railroad, LLC, McClellan Business Park, LLC and County of Sacramento, by e-mailing copies to their counsel, Louis E. Gitomer, Esq., at Lou@lgraillaw.com.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

cc: Louis E. Gitomer, Esq.

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY,

Complainants,

v.

SACRAMENTO VALLEY RAILROAD, LLC, MCCLELLAN BUSINESS
PARK, LLC AND COUNTY OF SACRAMENTO,

Respondents.

COMPLAINANTS' PETITION AND SURREPLY
IN SUPPORT OF THE AMENDED PROTECTIVE ORDER

Torgny R. Nilsson
General Counsel
Sierra Railroad Company
221 1st Street
Davis, CA 95616
Tel.: (530) 759-9827

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Attorneys for

SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY

Dated: February 28, 2012

SIERRA RAILROAD COMPANY AND SIERRA NORTHERN RAILWAY,

Complainants,

v.

SACRAMENTO VALLEY RAILROAD, LLC, MCCLELLAN BUSINESS
PARK, LLC AND COUNTY OF SACRAMENTO,

Respondents.

COMPLAINANTS' PETITION AND SURREPLY
IN SUPPORT OF THE AMENDED PROTECTIVE ORDER

Complainants, Sierra Railroad Company ("Sierra") and Sierra Northern Railway ("SERA"), pursuant to 49 C.F.R. §1117.1, respectfully petition the Board for leave to file their Surreply to the misdirected Reply-to-a-Reply of Respondents, Sacramento Valley Railroad, LLC ("SAV"), McClellan Business Park, LLC ("McClellan") and the County of Sacramento ("County"), filed February 27, 2012, and in support thereof Complainants state the following:

1. Just as at times the Board will entertain a reply to a reply so that it will have the benefit of a complete record, so will the Board permit a party to file a surreply, when impartiality and fairness call for a response to an impermissible reply to a reply and the party whose reply to a reply is being entertained by the Board will not be prejudiced by the receipt of the tendered surreply. *See, i.e.,* Docket No. FD 35496, *Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, L.C.C.--Petition for Declaratory Order*, served February 23, 2012; Docket No. FD 30186 (Sub-

LLC--Petition for Declaratory Order, served May 7, 2010. Respondents deliberately have mischaracterized Complainants' Reply, filed February 23, 2012, and they will not be adversely affected by the Board's receipt of Complainants' tendered Surreply.

2. In their Reply-to-a-Reply, at pages 4 and 5, Respondents completely misrepresent Complainants' Reply, filed February 23, 2012. Complainants did not -- and do not -- oppose the Board's entry of a Protective Order, as Respondents assert in their Reply-to-Reply. To the contrary, Complainants' are dependent upon the Board's entry of the Protective Order, albeit amended as they have asked to add a single paragraph so that a potential purchaser of Sierra will be able to complete its due diligence inquiry without risking the disclosure of materials designated in this proceeding as CONFIDENTIAL or HIGHLY CONFIDENTIAL.

3. Patriot's managers and members are highly sophisticated and widely experienced businessmen, with many years of dealings in the railroad industry.¹ They know full well that any purchaser of a railroad or railroad holding company will insist on undertaking a due diligence inquiry of the property sought to be acquired, and that the due diligence inquiry invariably includes the review of all litigation materials, including the pleadings, testimony, exhibits and briefs involved in all pending cases. The Board's proceedings are not exempt. It is the height of hypocrisy for Respondents to express concern about the potential disclosure of materials they deem to be CONFIDENTIAL or HIGHLY CONFIDENTIAL and at the same time oppose committing the potential

¹ It hardly warrants repeating that Patriot is among the real parties in interest in this proceeding for its complete control of SAV.

4. Indeed, when Patriot and Sierra entered into negotiations for Patriot's acquisition of Sierra, Patriot undertook the very same sort of due diligence inquiry of Sierra as the potential purchaser of Sierra currently is pursuing. Moreover, Patriot and Sierra entered into a non-disclosure agreement so that Patriot would be able to obtain from Sierra the commercially sensitive CONFIDENTIAL and HIGHLY CONFIDENTIAL materials which Sierra would not divulge in the absence of a non-disclosure agreement. Sierra and its potential purchaser are unable to enter into a similar non-disclosure agreement, because Patriot in the District Court case, as well as the Respondents in this proceeding, have prohibited Sierra from disclosing any CONFIDENTIAL and HIGHLY CONFIDENTIAL litigation materials except as provided by the District Court's Protective Order and the Respondents' draft Protective Order. So that the potential purchaser of Sierra might view the CONFIDENTIAL and HIGHLY CONFIDENTIAL litigation materials as part of its due diligence inquiry of Sierra, the District Court has amended its Protective Order, and Complainants have requested the Board to amend Respondents' draft Protective Order by the addition of the concluding paragraph set out in their Reply.

5. At pages 4 and 5 of their Reply-to-a-Reply, Respondents express the fear that, although their draft Protective Order may be amended as the Complainants have asked, the CONFIDENTIAL and HIGHLY CONFIDENTIAL materials may be used for other purposes than the due diligence inquiry of Sierra which its potential purchaser has undertaken. Coming from Respondents, that's a little like the pot calling the kettle black.

say steal -- the operations on the seven-mile railroad line within the McClellan industrial park from SERA, the rail carrier which had been authorized by the Board to serve the facility as a rail carrier and which did so quite satisfactorily from 2001 to 2008.

6. It is utter nonsense for Respondents to suggest, as they do at page 6 of their Reply-to-a-Reply, that Sierra should not have begun the negotiations for its acquisition by the potential purchaser until after this proceeding has been concluded. Under Respondents' proposal a railroad or railroad holding company would hardly ever be able to find someone who may be interested in acquiring it, for it most likely will be involved in an acquisition, extension, abandonment, declaratory order, rate or one of any number of types of proceedings for which Board approval would be required. And in any one of those there is a possibility that CONFIDENTIAL or HIGHLY CONFIDENTIAL materials would need to be filed with the Board, but subject to the strictures that the Board's Protective Order would afford.

7. At page 6 of their Reply-to-a-Reply, Respondents express the feigned fear that the potential purchaser of Sierra "most likely is not a railroad subject to the jurisdiction of the Board (and therefore generally not subject to sanctions by the Board)." How frightful! Come now, Patriot's managers and members over the years have signed sufficient numbers of verifications in support of pleadings filed with the Board to know that willful misstatements or omissions of material fact constitute Federal criminal violations punishable under 18 U.S.C. §1001 by imprisonment up to five years and fines up to \$10,000 for each offense. The paragraph which Complainants ask be added to

Confidential Materials and the Undertaking for Highly Confidential Materials which they would they would need to sign before viewing the CONFIDENTIAL and HIGHLY CONFIDENTIAL litigation materials of this proceeding.

8. At page 6 of their Reply-to-a-Reply, Respondents infer that the Board really doesn't know that negotiations are occurring between Sierra and a potential purchaser and that the potential purchaser's due diligence inquiry requires the production of documents produced in discovery in this proceeding. If the Board requires any reassurance, it can get it from Patriot, for Patriot knows full well that such negotiations are in progress and that the potential purchaser's due diligence inquiry requests the disclosure of all litigation materials, including those in this proceeding.

9. Complainants are not quite as stupid as Respondents portray them to be at page 7 of their Reply-to-a-Reply. Of course, HIGHLY CONFIDENTIAL materials would not be allowed to be viewed by Sierra or its in-house counsel where they would be reviewed by the potential purchaser's representative. HIGHLY CONFIDENTIAL materials will be provided only to Sierra's outside counsel who will have signed the Undertaking for Highly Confidential Materials, and it is there where the potential purchaser of Sierra, after having its representative sign the Undertaking for Highly Confidentiality Materials, would be able to review the HIGHLY CONFIDENTIAL materials. It is only the CONFIDENTIAL material which would be provided the management and in-house counsel of Sierra and only then if each has signed the Undertaking for Confidential

WHEREFORE, Complainants asks that the Board grant their section 1171.1
petition and permit them to file their tendered Surreply.

Respectfully submitted,

SIERRA RAILROAD COMPANY
SIERRA NORTHERN RAILWAY

By their attorneys,

Torgny R. Nilsson
General Counsel
Sierra Railroad Company
221 1st Street
Davis, CA 95616
Tel.: (530) 759-9827

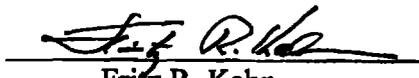

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Dated: February 28, 2012

CERTIFICATE OF SERVICE

I certify that I this day served the forgoing Complainants' Petition and Surreply on
Sacramento Valley Railroad, LLC, McClellan Business Park, LLC and the County of
Sacramento by e-mailing a copy to their counsel, Louis E. Gitomer, Esq., at
lou@lgraillaw.com.

Dated at Washington, DC, this 28th day of February 2012.


Fritz R. Kahn